Supreme Court, U.S.
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No. 99-13

In The

Supreme Court of the United States

GEORGE GREELEY, KIM ELIZABETH, GEORGE NICHOLAS, NYSSA GALE: BRYANT,

Petitioners,

vs.

WALTHAM SCHOOL COMMITTEE, ASSOCIATE JUSTICE MARGARET S. FEAREY,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Judicial Court Of Massachusetts

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Should this Honorable Court agree to review a decision of the Supreme Judicial Court of Massachusetts which affirmed the decision of the juvenile court finding the Petitioners' minor children in need of care and protection regarding educational care, and affirmed the home-school approval process required by the Respondent School Committee as being reasonably related to the state's legitimate interest in ensuring that all its citizens are educated, where the decisions are not in conflict with decisions of the United States Supreme Court or decisions of the First Circuit Court of Appeals or other decisions of the Supreme Judicial Court of Massachusetts?

Should this Honorable Court agree to review a question of whether the statute of another state should be applied as a less restrictive measure within the Commonwealth of Massachusetts?

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STATEMENT OF THE CASE

Factual Background

George Greeley Bryant and Kim Elizabeth Engler Bryant are the parents of two minor children, G. and N. ("children").

In October 1996, Daniel Doyle, supervisor of attendance for the Waltham Public Schools (Doyle), was informed by an elementary school principal that the children were not enrolled in school.

After an initial investigation, Doyle was informed by Kim Elizabeth Engler that she educated the children at home. After the parents were not forthcoming with any information regarding the home schooling of their children, in December 1996, Doyle initiated a criminal complaint pursuant to Massachusetts' compulsory attendance statute, Mass. Gen. Laws ch. 76, §§ 1, 2 (1998).

Despite two meetings between the parents and representatives of the Respondent School Committee and the intervention of the presiding justice of the district court, the parties were unable to reach a resolution of the issues regarding the education of the children. The sticking points were the authority of the Respondent School Committee and Respondent Court regarding the education of the children; the parents' refusal to permit assessment and standardized testing of the educational level and progress of the children; and the parents' refusal to provide information to enable the Respondent School Committee to assess the level of progress of the children.

The criminal complaint was later reduced to a civil matter at the request of the Respondent School Committee and the Commonwealth.

On June 2, 1997, Respondent School Committee filed a care and protection proceeding pursuant to Mass. Gen. Laws ch. 119, § 24 (1999) alleging the parents' refusal to cooperate in providing information that the children are receiving, have received or will receive the necessary and proper educational care. Upon the filing of the care and protection petition, Respondent School Committee requested that criminal (converted to civil) complaint be dismissed.

Procedural Background

Associate Justice Margaret Fearey presided over a three-day trial of the matter in the juvenile session of the Waltham District Court. The parents were represented by their own attorney and the Court appointed an attorney for the children. On July 31, 1998, Judge Fearey found the children in need of care and protection and issued an order which required the parents to submit home school plans for the children and have the children independently evaluated or enroll the children in a public or approved private school by September 8, 1998. If the parents failed to do so, temporary custody of the children would be transferred to the Department of Social Services (DSS). Petition for Writ of Certiorari, App. C at 22-51.

The attorney for the parents filed a motion to allow the late filing of an appeal of Judge Fearey's July 31, 1998 order. The Court allowed the motion, but said appeal was

subsequently withdrawn by Petitioners' counsel on August 18, 1998.

Since there had been no compliance with the July 31, 1998 order of the court, on October 7, 1998, Judge Fearey granted temporary legal custody to DSS.

On or about October 13, 1998, the parents filed an emergency interlocutory request to a Single Justice of the Supreme Judicial Court of Massachusetts to prevent DSS from exercising custody. Said request was denied.

The parents appealed the October 7, 1998 order to the Massachusetts Appeals Court, which was denied by a Single Justice on January 20, 1999. The parties are awaiting the decision of the Massachusetts Appeals Court regarding the October 7, 1998 court order.

The parents also filed a petition pursuant to Mass. Gen. Laws ch. 211, § 3 (1998) with the Supreme Judicial Court of Massachusetts alleging that Judge Fearey had committed error in the district court proceedings. Said petition was denied on December 2, 1998, by a Single Justice of said Court. *Id.* App. B at 17-21. On or about December 16, 1998, the Supreme Judicial Court of Massachusetts denied the parents' Emergency Motion for Stay Pending Appeal. On January 26, 1999, the Supreme Judicial Court of Massachusetts denied the parents' Motion for Direct Appellate Review. On February 12, 1999, the Supreme Judicial Court of Massachusetts affirmed the decision of the Single Justice. *In re Bert*, 429 Mass.1001, 705 N.E.2d 625 (1999). On March 26, 1999, the Supreme Judicial Court of Massachusetts denied parents' Petition for Rehearing. Petitioners' Writ at 16.

The care and protection matter is still pending in the district court before Judge Garinger pending receipt from the parents of progress reports for each child for the school year ending June 30, 1999 and for the submission of home school plans for the 1999-2000 school year, which have not been received to date. Judge Garinger revoked the temporary custody order to DSS after the Petitioners provided testing data to the Repondent School Committee.

REASONS WRIT SHOULD BE DENIED

A. PETITIONERS DID NOT RAISE QUESTION 1(a) IN THE LOWER COURT PROCEEDINGS.

Petitioners' Question 1(a) invokes the right to "freely possess and exercise their religion per Massachusetts Constitution, Part I, Article II". As the findings of Judge Fearey of the Waltham District Court and the decisions of Justice Ireland and the Supreme Judicial Court of Massachusetts illustrate, the Petitioners during trial did not raise the issue of free exercise of religion. *Id.* at 14-51. During the lower court proceedings the Petitioners attached portions of the Massachusetts Declaration of Rights as the children's home schooling plan. This illustrates that the parents' reasons are philosophical rather than religious. A philosophical choice such as this would not rise to the demands of the Religious Clauses. *See Wisconsin v. Yoder*, 406 U.S. 205, 216, 92 S.Ct. 1526, 1533, 32 L.Ed.2d 15 (1972). Hence said question is not properly before the Court. *See White River Lumber Co. v. Arkansas ex rel. Applegate*, 279 U.S. 692, 700 (1929).

B. PETITIONERS HAVE FAILED TO EXHAUST THEIR APPELLATE REMEDIES.

Petitioners' Question 1 (e) invokes the right to be fully heard in his defence by himself, or his council, at his election per Massachusetts Constitution Part I, Article XII. Petitioners equate the word "council" to mean members of their "Council" who are neither attorneys nor family members. The district court judges have consistently excluded non- family members and members of the "Council" from the courtroom due to the fact that juvenile proceedings are closed to the public pursuant to Mass. Gen. Laws ch. 119, § 38 (1999). Petitioners heretofore have not appealed this issue to the Massachusetts Appellate Courts. Question 1(e) is not properly before this Court since Petitioners have not exhausted their appellate remedies. *See Republic Natural Gas Co. v. Oklahoma, et al.*, 334 U.S. 62, 72, 68 S.Ct. 972, 978, 92 L.Ed. 1212 (1948).

C. THE PETITION FOR WRIT OF CERTIORARI DOES NOT PRESENT QUESTIONS OF FIRST IMPRESSION OR NOVEL QUESTIONS OF LAW AND THE CASE AT BAR IS NOT DISTINGUISHABLE FROM THE DECISIONS OF THE UNITED STATES SUPREME COURT, THE FIRST CIRCUIT COURT OF APPEALS AND THE MASSACHUSETTS SUPREME JUDICIAL COURT.

Both the United States Supreme Court and the Supreme Judicial Court of Massachusetts have upheld the rights of parents to home school their children. *See Yoder*, 406 U.S. at 213, 92 S.Ct. at 1532; *Pierce v. Society of Sisters*, 268 U.S. 510, 535, 45 S.Ct. 571, 573, 69 L.Ed. 1070 (1925);

Pustell v. Lynn Public Schools, 18 F.3d 50 (1st Cir. 1994); *Brunelle v. Lynn Public Schools*, 428 Mass. 512, 514, 702 N.E.2d 1182, 1184 (1998); *Care and Protection of Charles*, 399 Mass. 324, 332-336, 504 N.E.2d 592, 598-600 (1987).

Said right, however is not absolute and must be balanced against the substantial state interest in the education of its citizenry. *Brown v. Board of Education*, 347 U.S. 483, 493, 74 S.Ct. 686, 691 (1953); *New Life Baptist Church Academy v. Town of East Longmeadow*, 885 F.2d 940, 944, 955 (1st Cir. 1989), *cert. denied*, 494 U.S. 1006 (1990); *Brunelle*, 428 Mass. at 514, 702 N.E. 2d at 1184 (1998); *Care and Protection of Charles*, 399 Mass. at 335, 504 N.E. 2d at 599. The family is not beyond regulation. *See Prince v. Massachusetts*, 321 U.S. 158, 166, 64 S.Ct. 438, 442 (1944); *Attorney General v. Bailey*, 436 N.E.2d 139, 146 (1982).

However, the Petitioners refuse to acknowledge that they are subject to such requirements. This is not a question of interpretation of law, but rather the issue here is their refusal to acknowledge the existence of such law.

While the Petitioners claim jurisdiction under the Ninth and Tenth Amendments and Article IV § 4 of the United States Constitution, there is nothing in neither the record nor the decisions below that support any federal questions presented under said sections.

D. THE PROCEDURES FOR THE OVERSIGHT OF HOME SCHOOLING UNDER THE MASSACHUSETTS CASES AND STATUTES ARE REASONABLE MEASURES TO GUARANTEE THE PROTECTION OF THE RIGHT OF CHILDREN TO AN EDUCATION AND ENSURE THAT THE COMPELLING STATE'S INTEREST IN THE EDUCATION OF ITS CITIZENRY IS MET.

Massachusetts' compulsory attendance statutes provide that a child between the ages of 6-16 attend a public school, an approved private school or otherwise be instructed in a manner approved in advance by the superintendent or school committee. Mass. Gen. Laws ch. 76, § 1 (1998).

The statutory exception authorizes home schooling. In doing so, it protects the basic constitutional right of parents to direct the education of their child. *See Brunelle*, 428 Mass. at 514, 702 N.E. 2d at 1184.

Care and Protection of Charles indicates that school committees must have access to textbooks, workbooks and instructional aids used by the children and may properly require periodic standardized testing or periodic progress reports. *Care and Protection of Charles*, 399 Mass. at 338-341, 504 N.E. 2d at 601, 602. The tenets of *Charles* were recently upheld by the Supreme Judicial Court of Massachusetts in *Brunelle v. Lynn Public Schools. Id*, 428 Mass. at 514, 703 N.E. 2d 1184.

Respondent School Committee sought progress reports and standardized tests from Petitioners. Respondent School Committee has never sought home visits.

Petitioners contend that the children's educational materials are private property and not to be disclosed to Respondent School Committee.

Almost all states require periodic assessment of home-schooled students' academic progress. *Brunelle*, 428 Mass. at 516, 702 N.E. 2d at 1185, n. 7. Further, Mass. Gen. Laws ch. 119 § 24 (1999), independent of *Care and Protection of Charles*, empowers the divisions of the juvenile court to commit a child to custody of DSS or make other appropriate order on the petition of any person alleging that a child is in need of care and protection. Juvenile courts in Massachusetts also have broad equity powers by virtue of Mass. Gen. Laws ch. 218 § 59 (1999). The juvenile court did not commit error when it adjudicated Petitioners' children in need of care and protection and granted temporary custody to DSS.

The petitioners have failed to demonstrate that Massachusetts statutes and opinions are inapplicable to them or that the case at bar is distinguishable from the decisions of First Circuit Court of Appeals or from the decisions of the United States Supreme Court.

E. PETITIONER HAS FAILED TO DEMONSTATE THAT A SUBSTANTIAL FEDERAL QUESTION HAS BEEN RAISED OR DECIDED BELOW REGARDING THE APPLICATION OF THE REFERENCED ALASKA STATUTE

Petitioners assert that Alaska statute 14.30.010 cannot be ignored without derogating the Massachusetts Constitution. Petitioners have failed to demonstrate that a substantial federal question is involved. Further the lower

courts never addressed the issue of the constitutionality or unconstitutionality of said Alaska statute.

CONCLUSION

For these reasons, Respondent Waltham School Committee prays that this Court decline to grant the writ of certiorari.

Dated: July 27, 1999

Respectfully submitted,

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